No. 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

ELMER W. HENDERSON, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN RAILWAY CO., *Appellees*.

On Appeal from the United States District Court for the District of Maryland.

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

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The National Lawyers Guild respectfully prays leave to file a brief as amicus curiae in the above captioned case. The applicant has filed with the clerk the written consent of counsel for appellant and for all of the appellees except the Southern Railway Company who though requested refused to give his consent.

The National Lawyers Guild is an organization of members of the American bar, devoted particularly to the protection of the fundamental civil rights guaranteed by the Constitution of the United States. It believes that the question presented in this case probes the very essence of those rights. It further believes that the concept upon which the judgment below rests is at odds with the letter, no less than with the spirit of our Constitution. The effect of that concept—the division of our democracy along racial lines—threatens not alone the civil rights of all minority groups, but the security of democratic institutions. The National Lawyers Guild conceives it to be its public duty, as an organization of members of the bar, to bring before this Court the reasons which impel its conclusion that the judgment below should be reversed. It therefore respectfully requests leave to file a brief as amicus curiae.

BRIEF OF THE LAWYERS GUILD AS AMICUS CURIAE.

OPINIONS BELOW.

The opinions of the United States District Court for the District of Maryland (R. 63, 248) are reported in 63 F. Supp. 906 and 80 F. Supp. 32.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 7253 of the Judicial Code, 28 U.S.C. Sec. 1253.

QUESTION PRESENTED.

This brief will discuss only the question whether, by approving and supporting the segregation of passengers on the basis of race alone in the dining car of an interstate rail carrier so as to prevent appellant, solely because of his race, from being seated and obtaining service at a vacant table of his choice, the Interstate Commerce Commission has infringed rights guaranteed appellant by the Interstate Commerce Act and the Fifth Amendment.

STATEMENT.

On May 17, 1942, appellant, a Negro, travelling from Washington, D. C., to Atlanta, Georgia, as a first class passenger on a train of the Southern Railway Company, was refused service in the dining car of the train solely because of his race. By regulation of the carrier two tables in the dining car were allegedly reserved for Negro passengers. However, when appellant first applied for service several of the seats at these two tables were occupied by white passengers and for this reason appellant was refused service at any of the vacant seats at these tables. Although seats at other tables in the dining car were va-

cant appellant was refused service at any of those tables because of his race.

The Interstate Commerce Commission, on complaint of appellant, found that appellant had been subjected unlawfully to undue and unreasonable prejudice and discrimination because of his race, but concluded that the entry of an order prohibiting such prejudicial discrimination in the future would serve no useful purpose, and dismissed the complaint.

The District Court for the District of Maryland set aside the Commission's order and remanded the case to the Commission. It held that the carrier's regulation which the Commission had approved and adopted and thereby, in effect, made its own, was invalid insofar as it authorized the seating of white passengers at tables reserved for colored passengers but did not authorize the seating of colored passengers at tables reserved for white passengers.

Thereafter, Southern Railway promulgated new regulations (R. 233), setting aside one table in each dining car for the use of colored passengers exclusively and the remaining tables for white passengers exclusively. The table reserved for colored passengers is located next to the kitchen, opposite the steward's office, and is separated from the body of the dining car by a five foot wooden partition. On rehearing pursuant to the remand the Commission found that in consideration of the anticipated proportion of white to colored passengers, the allocation of one table exclusively to colored passengers and the remainder exclusively to white passengers "provided an equitable and reasonable division between the races of its available dining car space."

The District Court, Judge Soper dissenting, affirmed. It summarized its conclusions as follows: Substantial inequality of treatment between Negro and other passengers on interstate carriers is forbidden by the Interstate Commerce Act and the Fifth Amendment. Segregation of passengers in dining cars by race alone, however, does not amount to

substantial inequality of treatment. Since segregation as such is not forbidden the inevitable consequences of segregation cannot be deemed to result in substantial inequality of treatment. Therefore, the fact that pursuant to the Railway's amended regulation, which the Commission approved, passengers are denied seating and service in dining cars solely because of their race—a denial which would occur whenever all seats in one section or another were occupied while seats in the section closed to persons of the particular passenger's race were vacant—may not be deemed to bring the regulation into conflict with the Act or the Constitution. To hold otherwise, said the court, "denies the very premise from which we start, namely that racial segregation is not, per se, unconstitutional." For the same reason the court held that no objection could be taken to the Commission's method of enforcing segregation, i. e., by separating the table to be used by Negroes from the remainder of the dining car by a wooden partition. The court said that "The same applies also to the location of the table allotted to colored passengers * * * at the end of the dining car, directly opposite the space newly provided for the steward's office. The undesirability of this location compared with that of tables in other parts of the dining car from the point of view of noise, heat, etc., as alleged by plaintiff, is, we think non-existent."

Appellant, having throughout the proceedings challenged the Railroad's regulations insofar as they require segregation of white and colored passengers in dining cars, on the ground that their enforcement violates rights guaranteed him by the Interstate Commerce Act and the Fifth Amendment, presses these contentions on this appeal.

ARGUMENT.

I. The Nature of the Issue.

The central issue in this case arises out of a conflict between two inherently irreconcilable doctrines both heretofore enunciated by this Court. One, the so called "separate but equal" doctrine, holds that racial segregation by government fiat is *per se*, compatible with the equal protection clause of the Fourteenth Amendment, and with the due process clause of the Fifth Amendment. The other, to which this Court has adhered increasingly in recent years, holds that race, as such, is constitutionally an irrelevance and that governmental classification based on race alone is unreasonable, invidious and therefore prohibited by the Fifth and Fourteenth Amendments. Under this doctrine only when loyalty to a race may reasonably be deemed incompatible with loyalty to the United States may a classification in terms of race survive. *Hirabayashi v. United States*, 320 U. S. 81, 100-102; *Ex Parte Endo*, 323 U. S. 283, 297, 302. Since the racial segregation here in issue requires classification on the basis of race, and since no claim is even advanced that such segregation is warranted by potential disloyalty of either race to the United States, one doctrine or the other cannot survive this case.

We think it clear that the issue thus posed is squarely presented in this case, despite the fact that the compulsory segregation here attacked was initiated not by a governmental agency itself but by the Railroad. In the first place, as this Court held in the *Restrictive Covenant Cases*, 334 U. S. 1, 20, the constitutional guaranties of equal protection and due process are not "ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement" or a private regulation. Here, as the court below recognized, the Railroad's regulation requiring segregation in dining cars was approved and adopted by the Interstate Commerce Commission as its own, and given

the status of a governmental regulation having the force of law. Such conduct by the Commission must comport with the Fifth Amendment.

Secondly, the Railroad itself, in promulgating regulations concerning service on its trains, does not act as a private individual whose discriminatory conduct, under the *Civil Rights Cases*, 109 U. S. 3, 17, is beyond the scope of constitutional limitations. As a public carrier the railroad is vested by Congress with duties, powers and privileges over interstate travel which necessarily must be exercised consistently with the Fifth Amendment. Cf. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 198; *Marsh* v. *Alabama*, 326 U. S. 501, 506; *United States* v. *Classic*, 313 U. S. 299, 326; *Smith* v. *Allwright*, 321 U. S. 649, 663. In dealing with interstate rail carriers Congress did not leave implicit, as it did in the *Steele* case, the duty to conform to those fundamental standards of due process, including the concept of equal protection of the laws, which bind both federal and state legislatures. In Section 3 (1) of the Interstate Commerce Act (49 U.S.C. 3(1)), Congress provided that "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, * * * in any respect whatsoever; or to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; * * *." That this formulation of the carrier's obligation is equivalent to the formulation of the duty to accord due process and equal protection contained in the Fourteenth Amendment has been affirmed by this court. *Mitchell* v. *United States*, 313 U. S. 80, 94. It follows, as the Court below assumed, that the compulsory segregation regulation here in issue can be deemed to comport with Section 3(1) of the Interstate Commerce Act only if compulsory segregation under the circumstances here presented, if undertaken by a state in relation to a state owned carrier could be deemed compatible with the Fourteenth

Amendment. Since only the "separate but equal" doctrine stands in the path of recognition that governmental segregation of individuals solely on the basis of race does violate the fundamental guarantees of due process and equal protection, the fate of that doctrine is inevitably before the Court.

II. The "Separate But Equal" Doctrine is Unsound.

The "separate but equal" doctrine has never been reconsidered by this Court since *Plessy* v. *Ferguson*, 163 U. S. 537, decided in 1896, injected it into the Constitution.[1] True, the doctrine has been applied in a number of cases,[2] but these reflect merely *stare decisis*, not independent approval based upon reevaluation by the Court of the premises and reasoning upon which the doctrine rests. As we shall show, *infra*, pp. 19-25, this Court, without purporting to disturb the doctrine, has repeatedly rejected the very premises upon which it is founded. Under these circumstances continued application of the doctrine is as anomalous as the doctrine itself.

A. The "separate but equal" doctrine is a product of fallacious reasoning and an improper approach to the requirements of the Fourteenth Amendment.

It is to be observed at the outset that the Court in *Plessy* v. *Ferguson* did not reason from the requirements of due process and equal protection to the conclusion that a classification based on race alone was permissible. Instead, it assumed the very conclusion in issue, *i.e.*, that racial segregation is a reasonable and permissible legislative end, and from that conclusion reasoned that the due process and equal protection clauses may not be deemed to invalidate

[1] See Waite, *The Negro in the Supreme Court*, 30 Minn. L. Rev. 219, 254, 256, 263, 283 (1946); Note, *Is Racial Segregation Consistent with Equal Protection of the Laws? Plessy* v. *Ferguson Reexamined*, 49 Col. L. Rev. 629 (1949).

[2] See, *e. g.*, *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 160; *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388, 395; *Missouri ex rel Gaines* v. *Canada*, 305 U. S. 337, 344; *Gong Lum* v. *Rice*, 275 U. S. 78, 85-86.

classification in terms of race which is indispensable to the achievement of that objective. Faced then with the necessity of giving some effect to the equal protection and due process clauses in a society segregated racially by law, the Court concluded that these requirements were met by affording to members of one race facilities or accommodations "equal" to those afforded the others.

Only three considerations were advanced by the Court to support its assumption that governmental segregation in terms of race is reasonable and therefore compatible with the Fourteenth Amendment. The first consideration, which was relied upon by the Court to distinguish segregation by color of skin, from segregation by color of hair, or nationality, or citizenship was that racial segregation comports with "the established usages, customs and traditions of the people" (163 U. S. at pp. 549-550). But if established customs and usages were themselves sufficient to sustain the reasonableness of classification in terms of race what becomes of the Court's assertion in *Strauder* v. *West Virginia*, 100 U. S. 303, 306, 307, that the Fourteenth Amendment can not be evaded by laws enacted to perpetuate distinctions which existed prior to its adoption. As the Court stated: "it required little knowledge of human nature to anticipate that those who have long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed". It would seem that a state law requiring segregation of the Negro from the white race, if not condemned by the fact that it was enacted "to perpetuate the distinctions that had before existed," is certainly not justified thereby.

The second consideration advanced by the Court was that state legislatures must be at liberty to act to promote the "comfort" of the people and to take steps to preserve the "public peace and good order." 163 U. S. at p. 550.

Significantly, no evidence whatever was referred to by the Court to support its assumption that the "comfort" of members of either race, as distinguished from the racial prejudices of individuals, could reasonably be thought to be promoted by enforced racial segregation. Nor did the Court disclose any factual basis for its assumption that "peace and good order" could be promoted thereby. But, this defect aside, the Court's approach erroneously assumes that the fundamental rights guaranteed by the Fourteenth Amendment are subordinate to state police power, not limitations upon it. This assumption survives today nowhere in our law. It has been expressly repudiated even where urged in support of ordinances requiring racial segregation. As the Court said in *Buchanan* v. *Warley*, 245 U. S. 60, 74, "the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution." To suggest that a particular measure finds support in the police power does not determine whether specific constitutional limitations prohibit its adoption and enforcement. Indeed, *Buchanan* v. *Warley*, 245 U. S. 60, repudiated the very notion upon which the Court relied in *Plessy* v. *Ferguson*, *i. e.*, that promotion of public peace by preventing race conflicts may constitutionally be attained by compulsory racial segregation. "It is urged," said the Court in *Buchanan* v. *Warley* (245 U. S. at p. 81), "that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

The third consideration suggested by the Court in the *Plessy* case was that the Fourteenth Amendment (163 U. S. at p. 544), "in the nature of things * * * could not have been intended to abolish distinction based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory

to either." For, said the Court (163 U. S. at pp. 551-552), "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences * * *. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

The Court's assumption that the Fourteenth Amendment must have been intended to secure equality to the Negro race only in the field of so called "civil and political rights" is a distortion of the *Civil Rights Cases*, 109 U. S. 3, in which a distinction between "social rights" and "political" or "civil" rights was first suggested. In the *Civil Rights Cases* that distinction was made to indicate the difference between the character of rights protected by the Thirteenth Amendment and those protected by the Fourteenth. The Thirteenth Amendment, said the Court, was designed to secure only "those fundamental rights which are the essence of civil freedom", not "what may be called the social rights of men and races in the community" (109 U. S. at p. 22). The latter class of rights, the Court assumed, were intended to be protected by the Fourteenth Amendment (109 U. S. at pp. 19, 21). "Many wrongs", said the Court "may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery * * *. What is called *class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment*, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another. The Thirteenth Amendment has respect, not *to distinctions of race, or class or color*, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws" (109 U. S. at pp. 23-24, see also p. 25, italics added).

For the Court's conclusion in the *Civil Rights Cases* that statutes distinguishing between persons on the basis of race, while not tending to reimpose slavery, would deny equal protection of the laws, the Court in the *Plessy* case substituted an entirely different conclusion (163 U. S. at p. 543), that "A statute which implies merely a legal distinction between the white and colored races * * * has *no tendency to destroy the legal equality of the two races*, or establish a state of involuntary servitude" (Italics added).

This erroneous construction of the *Civil Rights Cases* was again set forth in *Buchanan* v. *Warley*, 245 U. S. 60, 79. There, speaking of the Fourteenth Amendment as well as the Thirteenth, the Court said: "These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color."

On the merits, such a conclusion concerning the scope of the Fourteenth Amendment cannot bear even superficial scrutiny. In the first place, if so called "social rights" are not protected by the Fourteenth Amendment, why is a state not free to deny to colored persons benefits and privileges which it accords to white persons? If only "social rights" are involved in laws regulating such matters as transportation, accommodations in inns, etc., by what warrant does the Court require the states to provide "equal" facilities for the white and colored races? If the states are not precluded by the Fourteenth Amendment from recognizing an assumed "social" inferiority of the Negro race, it would follow that the states could require that, compatibly with their inferior social status, colored persons be allotted facilities in the "social sphere" inferior to those allotted white persons. The Court's own recognition in the *Plessy* case that a state may not constitutionally accord benefits or facilities of any kind to members of one race inferior to those accorded members of the other

suffices to refute the proposition that there is a field of "social rights" to which the prohibitions of the Fourteenth Amendment against racial discrimination by law does not apply.

Secondly, evidence of the very nature advanced by the Court in the *Civil Rights Cases* to show that the Thirteenth Amendment was not intended to protect so-called "social rights", demonstrates that the Fourteenth Amendment was. In that case (109 U. S. at p. 22) the Court regarded the fact that the Civil Rights Bill of 1866 (14 Stat. 27), passed after enactment of the Thirteenth Amendment but before enactment of the Fourteenth Amendment, undertook to protect only such "fundamental rights" as the "right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey real property," as an authoritative indication that the protection of the Thirteenth Amendment extended only to rights of that character. By parity of reasoning, the fact that the Civil Rights Act of 1875 (18 Stat. 335), enacted after adoption of the Fourteenth Amendment, undertook to protect the right to equal accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, demonstrates that these rights were the subject of the Fourteenth Amendment.

Third, and conclusive, is the fact noted in *Strauder* v. *West Virginia*, 100 U. S. 303, 310 that "The Fourteenth Amendment makes no attempt to enumerate the rights it is designed to protect. It speaks in general terms, and those are as comprehensive as possible." The very terms of the Fourteenth Amendment leave no room for any distinction between "civil and political" rights and "social" rights. "It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States *shall be the same* for the black as for the white; that all persons, whether colored or white, shall

stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" (100 U. S. at p. 307, italics added).

By indulging the fallacious assumption that so called "social rights" are not protected by the Fourteenth Amendment, the Court in the *Plessy* case was able to evade entirely the critical fact that even a law "which implies merely a legal distinction between the white and colored races" (163 U. S. at p. 543) is a "law" within the meaning of the equal protection and due process clauses and that it must therefore be "the same" (*Strauder* case, 100 U. S. at p. 307) for one as for the other. Of course, for the Court in the *Plessy* case to have faced that fact would be to condemn the law, for there is no escape from the proposition, recognized in the *Civil Rights cases*, 109 U. S. 3, 24, as well as in *Strauder* v. *West Virginia*, 100 U. S. 303, 307, that "class legislation" embodying "distinctions of race * * * or color" is *per se* discriminatory and denies equal protection of the laws. A law which denies anything to the members of the Negro race which it grants to members of the white race cannot possibly be said to be "the same" for both, even though the same law may grant something else to the Negro race which it denies to the white race.

Moreover, by taking as its reference "the nature of things", rather than the terms of the Fourteenth Amendment, the Court in the *Plessy* case (16 U. S. at p. 544) was able to escape notice of the equally critical fact that, whatever may be said of its effect upon "social equality", compulsory segregation is an infringement of liberty. The language of the Fourteenth Amendment, said the Court in the *Strauder* case (100 U. S. at p. 310), "is prohibitory, but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property. Any state action that denies this immunity to a

colored man is in conflict with the Constitution." The Fourteenth Amendment does not place the right to "liberty" on a different plane than the right to own or acquire property. The fact that segregation laws infringe liberty could not have been faced without condemning the law. For the *Strauder* case had made it clear that any law which restrained the liberty of any person on the ground of race alone *per se* infringed the immunity conferred by the Fourteenth Amendment.

The assumption of the Court in the *Plessy* case that segregation by law must necessarily be permissible because segregation is voluntarily practiced by individuals and "Legislation is powerless to eradicate racial instincts" (163 U. S. at p. 551) is likewise a distortion of the *Civil Rights Cases*. The whole point of the *Civil Rights Cases* was that the Fourteenth Amendment did not undertake to prohibit the practice by individuals of the very racial discrimination which was prohibited to the states. To assert that because individuals are free to discriminate on the basis of race the states must likewise be free to do so; that, indeed, the states may require this even of unwilling individuals, is to throw the *Civil Rights Cases* to the winds.

In the *Restrictive Covenant Cases*, 334 U. S. 1, this Court disposed of the notion that a state is left free by the Fourteenth Amendment to take cognizance of the "racial instincts" of its citizens in the formulation or enforcement of its laws.[3] There the contention was pressed that the states must be free to enforce restrictive covenants because such private covenants were manifestations of "racial instincts" which private persons could lawfully indulge. To that this Court replied (334 U. S. at p. 19):

> These are not cases, as has been suggested, in which the States have merely abstained from action, leaving

[3] It is significant that a number of state court cases upholding the enforcement of restrictive covenants against attacks based on the Fourteenth Amendment relied on the *Plessy* case. *Meade* v. *Dennistone*, 173 Md. 358, 196 Atl. 330; *Parmalee* v. *Morris*, 218 Mich. 625, 188 N. W. 330; *Kochler* v. *Rowland*, 275 Mo. 573, 205 S. W. 217.

> private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny * * *, on the grounds of race or color, the enjoyment of property rights * * *. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

Regulations requiring segregation in public carriers on the basis of race, when authorized by either the states or the federal government, stand in no better position than judicial enforcement of restrictive covenants. Those regulations do not leave private individuals, the respective passengers, "free to impose such discrimination as they see fit" (334 U. S. at p. 19). Rather, the regulations operate to deprive passengers of both races who desire to associate together of the liberty of doing so. In this respect "the coercive power of government" (334 U. S. at p. 19) operates precisely as it did in the *Restrictive Covenant Cases* when it prevented a willing white vendor from selling his property to a Negro purchaser.

Moreover, just as in the *Restrictive Covenant Cases*, prohibition against judicial enforcement did not compel private individuals to refrain from racial discrimination in disposing of their property, so prohibition of compulsory segregation would not compel "commingling of the two races upon terms unsatisfactory to either" (163 U.S. at p. 544). Just as home owners who object to residing next door to members of another race are free on that account to move, so passengers who do not wish to be seated and served at a table adjacent to that occupied by a person of another race are not compelled to be or remain seated there. Passengers can no more demand of the law, however, that it prevent persons of other races from being seated at any vacant table of their choice in public dining cars, than they can de-

mand that it prevent persons of other races from residing in houses adjacent to their own.

The second aspect of the "separate but equal" doctrine, that as long as "equal" facilities are offered members of the two races the equal protection clause is satisfied, rests also upon fallacious premises. In the first place, the Court's assertion in the *Plessy* case (163 U.S. at p. 551), that as long as equal facilities are provided in a statute requiring segregation the statute cannot be deemed to stamp "the colored race with a badge of inferiority," rests upon a presumption, not upon the facts. As Mr. Justice Harlan pointed out in his dissenting opinion (163 U.S. at p. 557), "The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary." The majority opinion avoided this difficulty by indulging a conclusive presumption that guise and reality were one and the same. Such an approach toward the constitutionality of legislation which distinguishes on the basis of race, color or creed, has, in recent years, been discarded by this Court. Even the usual presumption of constitutionality does not bar independent investigation where statutes are claimed to invade fundamental rights guaranteed by the Constitution. *Schneider* v. *State*, 308 U.S. 147, 161; *Thomas* v. *Collins*, 323 U.S. 516, 529-531. Particularly is that true where claim is made that a particular statute which makes classification turn upon race, is the product of prejudice against "racial minorities." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4. Today such a statute is subjected to the "most rigid scrutiny". *Korematsu* v. *United States*, 323 U.S. 214, 216. Had such scrutiny been given to the ordinance involved in the *Plessy* case it could not have failed to reveal that which Mr. Justice Harlan thought no one could with candor deny. Compulsory racial segregation was and is no more directed against members of the white

majority than was judicial enforcement of restrictive covenants. Cf. *Shelley* v. *Kraemer*, 334 U.S. 1, 22.

Secondly, the Court's premise in the *Plessy* case that "equal" treatment could be accorded members of both races on a segregated basis, is, and has been demonstrated to be, false. If nothing else, the fact that the Negro race is a minority as compared with the white race would itself require that the facilities accorded to the one be fewer than those accorded to the other. But the Constitution speaks of equality, not proportionate equality. Beyond that, the fact that no two sets of facilities are ever precisely "equal" in all respects, would of necessity require, and it has in practice required, modification of the doctrine so that it becomes "separate, but substantially equal". This is the actual doctrine as applied by the Commission in the instant case. It is precisely because segregation on the basis of race is in practice impossible if the facilities accorded to members of the two races must be "equal", that the Commission and the Court below in this case could give no weight to the disparity inherent in the fact that the table assigned to Negroes is separated from the remainder of the car by a wooden partition, whereas no table assigned to white passengers is so separated, and that the table assigned to Negroes is by virtue of its location less desirable than the others by ordinary standards of human choice. Complete equality of facilities and segregation can co-exist only in fiction and not in fact. An objective comparison of the separate facilities for whites and Negroes held to be "substantially equal" in the state court cases purporting to follow *Plessy* illustrates the wide discrepancies in the treatment of the two groups which have in practice received judicial approval under the doctrine of that case.[4] If, as the Court assumed in the *Plessy* case, complete equality of facilities is the minimal requirement of the equal protection clause the doctrine itself must be discarded.

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[4] *e. g. Dameron* v. *Bayless*, 14 Ariz. 180, 126 Pac. 273; *Patterson* v. *Taylor*, 51 Fla. 275, 40 So. 493; *Reynolds* v. *Board of Education*, 66 Kan. 672, 72 Pac. 274; *Chiles* v. *Chesapeake & O. R. Co.*, 125 Ky. 299, 101 S. W. 386; *Tucker* v. *Blease*, 97 S. C. 303, 81 S. E. 668.

But even on the assumption that absolute equality of facilities is possible, and that such absolute equality could be achieved, for example, by assigning one entire side of a dining car to Negro passengers and the other side to white passengers, the real vice of the doctrine would remain. Dividing a dining car in half, and assigning one half exclusively to white passengers and the other exclusively to Negro passengers is, in principle, no different than dividing a residential block in half, and assigning one half for white and the other half for Negro occupancy. That, as this Court held in *Buchanan* v. *Warley*, 245 U. S. 60, the Fourteenth Amendment will not permit a state to do. The "separate but equal" doctrine, we submit, can no more constitutionally be applied in the one case than in the other.

B. "Separate but equal", as Constitutional dogma, is a contradiction in terms.

The basic fallacy in the thesis that compulsory segregation accords "equal protection", if only the treatment accorded each race is parallel was exposed by this Court in *Shelley* v. *Kraemer*, 334 U. S. 1, 22. There it was held that the imposition of identical limitations upon members of both races, far from amounting to "equal protection," constituted an "indiscriminate imposition of inequities."

In that case it was urged that no denial of equal protection could possibly be thought to inhere in judicial enforcement of restrictive covenants against colored purchasers, since the law would apply equally to enforce restrictive covenants against white purchasers. The answer given by the Court in that case is equally applicable here, where it is urged that the liberty of white passengers to sit at tables reserved for Negro passengers is limited equally with the liberty of Negro passengers to sit at tables reserved for white passengers. "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to

say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color" (334 U. S. at p. 22).

What the Court in the *Plessy* case failed to observe was that a law which did no more than restrict colored passengers to particular tables in a dining car, without making provision at all for the remaining tables would unquestionably deprive colored passengers of equal protection of the laws, regardless of how desirable, or how "equal" the facilities allotted to colored passengers were as compared to the remaining facilities. Adding to such a law a restriction against the use by white passengers of tables reserved for colored passengers could not possibly remove the illegality of the restriction upon colored passengers. It would, at most, impose an equally illegal restriction upon white passengers.

This critical flaw in the "separate but equal" doctrine has led the Court to deny it application in every case where the denial of liberty inherent in compulsory racial segregation could not be disguised by the label "social rights." *Buchanan* v. *Warley*, 245 U. S. 60; *Harmon* v. *Tyler*, 273 U. S. 668; *City of Richmond* v. *Deans*, 281 U. S. 704; *Shelley* v. *Kraemer*, 334 U. S. 1. The *Buchanan* case did not invalidate the segregation ordinance there involved on the ground that the residential opportunities afforded by it to colored persons were "unequal" in any sense to those allotted to white persons. Indeed, nowhere in the opinion did the Court even examine the question whether the areas restricted to colored occupancy were "equal" or unequal to those restricted to white occupancy. Instead, the Court pointed out that the ordinance was fatally defective because it deprived both white persons and colored persons of the liberty of disposing of their property to members of another race.

While the Court in the *Buchanan* case attempted to distinguish it from *Plessy*, the distinction advanced does not bear scrutiny. Thus, of *Plessy* it was said (245 U. S. 60,

79), that there was "no attempt to deprive persons of color of transportation in the coaches of the public carriers, and the express requirements were for equal though separate accommodations for the white and colored races. In *Plessy* v. *Ferguson*, classification of accommodation was permitted upon the basis of equality for both races." But there was no more an attempt in the *Buchanan* case to deprive persons of color of the right to dispose of their property, as such, than there was in *Plessy* an attempt to deprive them of transportation, as such. In the one case what was done was to limit by law the available class of purchasers to whom Negroes were at liberty to sell their property. In the other case what was done was to limit the available class of accommodations which Negroes were at liberty to seek. The restriction to a particular class of facilities was no more and no less "equal" in the one case than was the restriction to a particular class of purchasers in the other. Since the identical basis of "equality for both races," was present in both cases there existed no justification for upholding segregation in the one case that was not present in the other.

Whatever may have been true in 1917, it is today too late to distinguish between *Buchanan* and *Plessy* on the ground that the one touches property whereas the other touches personal rights. This Court has repeatedly recognized that the rights which have highest priority in our Constitutional scheme are personal rights, not property rights. See, *e.g.*, *Thomas* v. *Collins*, 323 U. S. 516, 529-532; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Marsh* v. *Alabama*, 326 U. S. 501, 509. While of course this does not mean that personal liberties are absolute, it certainly does mean that limitations cannot be imposed upon them for any reasons short of those which would warrant limitations upon the exercise of property rights.

A state may undoubtedly make reasonable regulations concerning the sale by an owner of his real property. It may even restrict the uses to which such property may be put. So too, a state and the federal government may make

reasonable regulations concerning seating in public conveyances, including the dining cars of trains. But the requirement of "reasonableness", which necessarily prohibits racial distinction, is as applicable in the case of regulation of the use of realty as in the regulation of seating in dining cars; just as one is a limitation on "property rights" so is the other a limitation on "personal rights." The right of a railroad passenger to be unhampered by unreasonable rules in selecting a seat and securing service in a railroad dining car is no less clear than the right of a Jehovah's Witness to approach the doors of householders for the purpose of conveying a message. See *Marsh* v. *Alabama, supra; Martin* v. *Struthers*, 319 U. S. 141, 146-147. The liberty of two passengers, members of different races, to sit and be served together on railroad dining cars can no more constitutionally be impaired than can the right of a Jehovah's Witness to proselytize for his sect at the home of a willing listener.

Liberty under the Fourteenth Amendment is the rule, not the exception. The Constitution does not speak of great liberties and small ones. Whenever government undertakes to confine individual liberty, no matter how great or how minor the confinement may be, the regulation must be justified by the same test of reasonableness. On that test, a "first come first served" rule may well be applied to limit the liberty of passengers to select seats in a dining car, just as a zoning ordinance may well be applied to the liberty of a property owner to erect a slaughterhouse in a residential neighborhood. But the test is the same, and if racial distinctions cannot be made to limit the liberty of the property owner, they cannot be made to limit the liberty of a railroad passenger.

Moreover, the quest for "equality" in terms of facilities accorded or limitations imposed ignores the fact that segregation does deny equality of valuation of human beings as such. It has been said that behind all "senses of equality, * * * lies the fact of individual self-consciousness and the consequent universal if vague demand for equality of

personal valuation."[5] To exclude this concept of "equality" of human personality from the meaning of the Fourteenth Amendment, which dealt with the very issue of "personal valuation", is to rob the Amendment of its intrinsic meaning. This Court has refused to do so, as is evident from its description of the rights guaranteed by the equal protection clause as "personal rights." Personal rights are those which are guaranteed each person because he is a human being. Unless, as to these rights, persons are treated alike as human beings equal protection is denied. Equal protection in this sense is obviously denied as the Court recognized in the *Strauder* case (100 U. S. at p. 307), if race, color or creed are permitted to make a difference.

C. The consequences of the "separate but equal" doctrine condemn it.

The basic premise of the *Plessy* case, that compulsory racial segregation is *per se* a constitutional exercise of state power, and that a state does not run afoul of the Fourteenth Amendment unless it imposes burdens on one race that it does not impose on the other, or allots benefits to one that it does not allot to the other, carries within itself implications which require its rejection.

For one thing, as the Court recognized in the *Plessy* case, the power to enforce racial segregation "obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person" (163 U. S. at p. 549). It is common knowledge that no one can, by mere observation, correctly so classify every person. Under these circumstances, since a state may use all reasonable means to effectuate its legitimate policies, would anything stand in the way of a requirement that all persons who know themselves to be members of the Negro race must identify themselves as such while travelling on trains by wearing a black arm band? Under

[5] Brinton, Crane, *Equality*, 5 Encyclopedia of Social Sciences, (1931), p. 579.

the "separate but equal" doctrine the Interstate Commerce Commission could certainly approve such a regulation, provided only that it was accompanied by a requirement that all white persons display white arm bands.

A requirement that colored persons wear colored arm bands and white persons white arm bands would not, moreover, have to be limited to passengers on trains. Since the doctrine has its genesis in "social relations", a requirement of self-identification as to race might be enforced by a state on all occasions when members of the two races might come into contact; on the streets, in stores, in polling places and in the jury box.

Nor is that all. If diminishing contact between the races is a legitimate objective of the police power, why may not a state, as Justice Harlan asked (163 U. S. at p. 557), "so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other?" Surely it is no answer that such a regulation would find no precedent in custom and usage. Few principles are better settled than that state police power is not confined to previously established codes and standards, and that the states are free to experiment with novel means of effectuating legitimate ends.

III. Compulsory Racial Segregation is Unconstitutional.

The anomalous "separate but equal" doctrine aside, there can be no question but that the carrier's rule violates the Interstate Commerce Act, and that its approval by the Commission violates the Fifth Amendment. Whenever this Court has considered the effect of the Fourteenth Amendment apart from the limitations of the "separate but equal" doctrine it has recognized that legislative classifications, for whatever purpose made, if based on race alone, are irrelevant, discriminatory, and therefore deny equal protection of the laws. As this Court said in *Hirabayashi v. United States*, 320 U. S. 81, 100: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are

founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection." As Mr. Justice Jackson put it, concurring in *Edwards* v. *California*, 314 U. S. 160, 185: race, creed or color "is a neutral fact-constitutionally an irrelevance."

The constitutional presumption that race and color are irrelevant to any proper object of legislation applies to all races and colors. But that it applies most strongly to classifications which distinguish the Negro race from the white race is self-evident, for it was primarily for the protection of the colored people that the amendment was designed.

As *Hirabayashi* holds, it is only with respect to those facts and circumstances which are "relevant to measures for our national defense and for the successful prosecution of the war" that Government may take into account matters "which may in fact place citizens of one ancestry in a different category from others" (320 U. S. at p. 100). Needless to say, no facts and circumstances are here shown which in any respect warrant placing Negro citizens in a different category than others. It follows here, as in the *Steele* case, that the distinctions "based on race alone are obviously irrelevant and invidious." *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203.

Racial segregation in railroad dining cars, as we have shown, restricts the liberty, and therefore the "civil rights" of colored as well as white citizens, no less than did the racial segregation condemned in the *Buchanan* and *Restrictive Covenant* cases. "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect." *Korematsu* v. *United States*, 323 U. S. 214, 216. The restrictions here imposed on both groups cannot stand, for no "pressing public necessity" is even suggested in excuse for them. Indeed, not even an allegation that segregation is necessary to avoid race conflicts could rationally be made in defense of compulsory segregation in railroad dining cars. However, even if there were such a danger this would certainly not amount to "pressing public

necessity" under the *Korematsu* rule. As *Buchanan* v. *Warley*, 245 U. S. 60, 81, held, dangers of that kind cannot constitutionally be met by compulsory racial segregation. To approve segregation on this ground would be to bow to "racial antagonism". And while "Pressing public necessity may sometimes justify the existence of such restriction; racial antagonism never can." *Korematsu* case, 323 U. S. at p. 216.

CONCLUSION.

This brief is limited to an analysis of the relevant legal principles. We believe this analysis shows that the judgment of the court below should be reversed and that the fallacious "separate but equal" doctrine should be eliminated from our law. Other briefs before this Court present social data which convincingly demonstrate the cruel and inhuman results which inevitably flow from racial segregation. We have here dealt with only legal principles, because we feel they compel the correct result. We heartily commend to the Court, however, a full consideration of the realities of "Jim Crow" practices.

We believe anyone who has ever viewed the process of separation of the races as applied to any minority race, carried out with the coercive power of government ever available to punish any deviation, knows the sight is incompatible with the principles upon which our government is founded. Until such daily scenes are erased from our land, the Constitution and its amendments remain for all real purposes a dead letter to those participating.

The instant case affords a splendid opportunity for decreeing that governmental sanction may no longer be used to compel racial separation. We urge the Court to so hold.

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